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No. 94-1569

Supreme Court, U.S.
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IN THE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

THE STATE OF TEXAS,

Petitioner

VS.

MICHAEL LYNN RILEY,

Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now the respondent, Michael Lynn Riley, by and through his attorney of record, William C. Wright, and asks leave to file the Respondent's Brief In Opposition without payment of costs and to proceed In Forma Pauperis. Respondent has previously been granted leave to so proceed in the 114TH District Court of Wood County Texas, The 12TH Court of Appeals of Texas, and the Court of Criminal Appeals of Texas. An affidavit is attached.

38 pp

Respectfully Submitted,

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BAR NUMBER 22065000
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AFFIDAVIT

THE STATE OF TEXAS)(
)(
COUNTY OF WOOD)(

Before me, the undersigned authority, on this the 16th day of May, 1995, personally appeared Michael Lynn Riley, who after being by me duly sworn, upon his oath deposes and says:

My name is Michael Lynn Riley. I am the defendant in Cause No. 12,101, entitled the State of Texas v. Michael Lynn Riley, in the 114th District Court of Wood County, Texas. I have advised the Court that I am too poor to employ counsel to represent me and the Court has appointed William C. Wright in the above cause. I further state, under oath, as aforesaid, that I do not own any property of any kind or character which I could sell or mortgage to secure funds for the purpose of employing counsel to represent me.

Michael Lynn Riley
Michael Lynn Riley

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this the 16th day of May, 1995.

[seal]

William P. Cohen
Notary public in and for the
the State of Texas

WILLIAM P. COHEN
MY COMMISSION EXPIRES
November 9, 1996

No. 94-1569

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

THE STATE OF TEXAS,

Petitioner,

v.

MICHAEL LYNN RILEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the standard enunciated in Wainwright v. Witt, 469 U.S. 412 (1985), which dispensed with the "unmistakable clarity" and "automatic decision-making" elements of previous standards, is the appropriate standard for reviewing claims that the trial court improperly excluded for cause jurors who oppose the death penalty.

2. Whether the court below accorded to the trial court's determinations of juror bias the deference demanded by this Court's holding in Wainwright v. Witt, 469 U.S. 412 (1985).

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IN THE SUPREME COURT
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No. 94-1569

THE STATE OF TEXAS,

Petitioner,

v.

MICHAEL LYNN RILEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

Respondent, Michael Lynn Riley, submits this brief in opposition to the State of Texas' petition for writ of certiorari to the Texas Court of Criminal Appeals.

CITATION TO OPINION BELOW

The *en banc* opinion of the Texas Court of Criminal Appeals, on both original submission and rehearing, is published. See Riley v. State, 889 S.W.2d 290 (Tex.Crim.App. 1994). A copy of the opinions on original submission and rehearing are attached to the petition for writ of certiorari as Appendix A.

JURISDICTION

On November 10, 1993, the Texas Court of Criminal Appeals reversed Mr. Riley's capital murder conviction and death sentence

on his automatic, mandatory direct appeal. Thereafter, the Court of Criminal Appeals granted rehearing but proceeded, on December 21, 1994, to re-affirm the court's opinion on original submission. Petitioner has invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This issues raised in this petition implicate the Sixth Amendment to the United States Constitution, as incorporated by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The pertinent parts of these provisions read as follows:

Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury of the State and district wherein the crime shall have been committed ...."

Amendment XIV

> "... [N]or shall any State deprive any person of life, liberty, or property, without due process of law .... "

STATEMENT OF THE CASE

Respondent, Michael Lynn Riley, was indicted for capital murder in the 114th Judicial District Court of Wood County, Texas, in 1986. He was tried before a jury on a plea of not guilty in late 1991. On November 19, 1991, he was found guilty of capital murder. Two days later, after a separate sentencing hearing, Respondent was sentenced to death after the jury returned affirmative answers to the two statutory "special issues" submitted

by the trial court. See TEX. CODE CRIM. PRO. Art. 37.071(b)(1) & (2), (e) (Vernon's ed. 1989).[1]

Under Texas law, Respondent's capital murder conviction and death sentence were automatically appealed to the Texas Court of Criminal Appeals. On November 10, 1993, a majority of the state appellate court concluded that a member of the venire, Bulah Brown, had been erroneously excluded for cause by the trial court in violation of the constitutional principles discussed in Adams v. Texas, 448 U.S. 38 (1980). See Riley v. State, 889 S.W.2d at 291-97. The State filed a motion for rehearing, contending that the Court of Criminal Appeals had failed to follow this Court's decision in Wainwright v. Witt, 469 U.S. 412 (1985), which re-affirmed this Court's 1980 decision in Adams v. Texas, supra. On rehearing, the Court of Criminal Appeals, after extensively

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[1]

Article 37.071

> (b) On conclusion of the presentation of the evidence, [at the sentencing phase of a capital murder trial] the court shall submit the following three issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> * * *
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death....

discussing Witt, re-affirmed its original decision to reverse the judgment of the trial court. See Riley v. State, 889 S.W.2d at 297-301 (on rehearing).

The only portion of the trial record relevant to the questions presented in the State's petition for writ of certiorari is the voir dire testimony of Bulah Brown. The State's petition for writ of certiorari and the Texas Court of Criminal Appeals' opinion on original submission and rehearing adequately set forth the pertinent portions of Ms. Brown's voir dire testimony. As the record of the voir dire reveals, Ms. Brown stated at the outset of the questioning that, because of her religious and moral scruples against capital punishment, she could not participate as a juror in a capital trial in which the State sought the death penalty. However, *after* being informed of both the nature of the oath that she would be required to take if selected as a capital juror and the Texas statutory "special issues"[1] that would be submitted to the jury during the sentencing phase in the event that Respondent were to be convicted of capital murder, Ms. Brown repeatedly and unequivocally stated that "if she [were to] take[] an oath to do so, she would 'have to' sacrifice her conscientious objections to the death penalty, and answer the special issues in accordance with the evidence. She testified unequivocally that her opposition to the death penalty would not substantially impair her ability to

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[1] See Tex. Code Crim. Pro. Art. 37.071(b)(2) (Vernon 1989). This Court has repeatedly discussed those "special issues" in other contexts. See, e.g., Graham v. Collins, 113 S. Ct. 892 (1993).

follow her oath and render a true verdict." Riley v. State, 889 S.W.2d at 297 (opinion on rehearing).

At the conclusion of Ms. Brown's voir dire, the trial court granted the State's motion to excuse Ms. Brown based on her views against capital punishment:

> All right. Gentlemen, on the State's challenge, in view of the [prospective] juror's repeated statements of moral and personal religious opposition to the death penalty, and on the Court's finding that, taken at best, the juror would have to overcome her moral and religious personal prejudice against the death penalty in order to perform her duty, the Court feels that the juror's views[,] personal, religious and moral, with regard to the death penalty, would substantially impair the performance of her duties as a juror if selected[.] [T]he Court will sustain the challenge for cause. ... [The] prejudice of the juror toward the death penalty on moral and religious grounds, would place an undue and unfair burden on the State on a material issue at trial. In is the Court's opinion[,] that would place the State in a position of discharging more than its duty of proof beyond a reasonable doubt.

S.F. vol. VI: 1044-45.[1] Defense counsel immediately objected to the trial court's decision to grant the State's motion to strike Brown for cause. Id.

On Respondent's automatic direct appeal, the Texas Court of Criminal Appeals, on both original submission and rehearing, carefully examined the totality of Ms. Brown's voir dire testimony and concluded that "the record clearly demonstrates" that Ms. Brown's personal views against capital punishment did not render her "[in]capable of following the law," as required by her oath,

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[1] "S.F." refers to the court reporter's transcription of the trial proceedings, which, in Texas, is referred to as the "statement of the facts."

and, thus, the trial court's ruling was erroneous. Riley, 889 S.W.2d at 297.[4] The state appellate court recognized that, although Ms. Brown initially stated that her anti-death penalty views would not permit her to participate as a juror at a capital trial, "[f]rom the time that the operation of the special issues was explained to her, venireman Brown steadfastly maintained she could take the oath and answer the special issues honestly, according to the evidence, even though it would violate her conscience. The record thus establishes she could follow the law; there is no basis to support a conclusion otherwise." Riley, 889 S.W.2d at 299 (opinion on rehearing). The state appellate court concluded that "our holding on original submission is therefore fully in keeping with the standard announced in Adams and reiterated in Witt." Id.

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The State's certiorari petition in this case makes much ado about nothing. The State attempts to characterize the Texas Court of Criminal Appeals' routine disposition of a direct appeal in a death penalty case as "flying in the face" of this Court's 1985 decision in Wainwright v. Witt, 469 U.S. 412 (1985), and also as being in "direct[] conflict with opinions of the highest criminal

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[4] Even though Ms. Brown was only one member of the venire, the trial court's erroneous removal of even a single venireperson based on that person's anti-death penalty views requires reversal. See Davis v. Georgia, 429 U.S. 122 (1976) (*per curiam*); Gray v. Mississippi, 481 U.S. 648 (1987).

courts of several states, as well as the opinions of various federal courts of appeals[] in their efforts to interpret and apply the Witt standard." *Petition*, at 16. An examination of both the relevant portions of the trial record and the Court of Criminal Appeals' opinions on original submission and on rehearing clearly reveals that the State's attempt to make this case worthy of a grant of certiorari misses the mark by a wide margin.

I.

CERTIORARI SHOULD BE DENIED BECAUSE, CONTRARY TO THE STATE'S CLAIM, THE TEXAS COURT OF CRIMINAL APPEALS CORRECTLY APPLIED THE WITT/ADAMS "SUBSTANTIAL IMPAIRMENT" STANDARD TO VENIREPERSON BROWN.

The State repeatedly contends that the Texas Court of Criminal Appeals' decision to reverse the trial court entirely failed to apply this Court's 1985 decision in Wainwright v. Witt, 469 U.S. 412 (1985). See, e.g., *Petition*, at 16, 22. This is simply untrue. The court below repeatedly discussed Witt, which re-affirmed the standard for removing prospective capital jurors for cause based on their anti-death penalty views first announced in this Court's 1980 decision in Adams v. Texas, 448 U.S. 38 (1980). See, e.g., Riley v. State, 889 S.W.2d at 297; id. at 298-301 (on rehearing). That standard permits a trial court to remove a prospective capital juror for cause, in keeping with the Sixth Amendment, only if "*those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.*" Witt, 469 U.S. at 420 (quoting Adams,

448 U.S. at 44) (emphasis in original).[5] That standard replaced the previous standard, set forth in *dicta* in Witherspoon v. Illinois, 391 U.S. 510 (1968), which did not permit a prospective capital juror to be struck for cause unless the juror made it "unmistakably clear" that he or she would "automatically" vote against capital punishment. Witherspoon, 391 U.S. at 522 n.21.

The State's first question presented in its certiorari petition implies that the Court of Criminal Appeals did not apply the Adams/Witt "substantial impairment" standard and instead "*seemed*" to resurrect "the 'unmistakably clear' and 'automatic decision-making' approach of Witherspoon." *Petition*, at 22 (emphasis added). This contention is entirely unfounded, as the lower court's opinions on both original submission and rehearing make clear. See Riley, 889 S.W.2d at 292, 296 ("Adams and its progeny control this resolution of [Respondent's claim]."); id. at 298-301 (discussing and applying Witt to Respondent's claim).

Indeed, the Court of Criminal Appeals noted that the voir dire testimony of two prospective jurors wrongly excluded in Adams v. Texas, supra, was in all respects virtually identical to Ms. Brown's voir dire testimony in the instant case. See Riley, 889 S.W.2d at 292-93 (discussing the voir dire testimony of Venirepersons White and Ferguson, who were wrongiy excluded in

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[5] In Witt, this Court held that "[w]e ... take this opportunity to clarify our decision in Witherspoon, and to reaffirm the above-quoted standard from Adams as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment." Witt, 469 U.S. at 424.

Adams, and noting that the voir testimony of these two prospective jurors in Adams "provide[s] guidance for our analysis of this case"). The State contends that the Court of Criminal Appeals' reliance on this Court's conclusion in Adams that Venirepersons White and Ferguson were wrongly excluded under the "substantial impairment" standard is inapposite because Adams only "addressed the question of whether the state of Texas could constitutionally exclude venire members from jury service merely because they were unable to take a[] [statutory] oath that mandatory penalty of death or life imprisonment would not 'affect [their] deliberations of any issue of fact.'" *Petition*, at 23, *quoting* Adams, 448 U.S. at 40 & TEX. PEN. CODE § 12.31(b) (Vernon 1980).

The State's attempt to undercut the significance -- recognized by the court below -- of this Court's application of the "substantial impairment" standard to those two prospective jurors in Adams is untenable. Although in Adams the specific issue before this Court was whether the Texas courts' application of the statutory oath contained in former TEX. PEN. CODE § 12.31 was constitutional, this Court also specifically held that "[i]t does not appear in the record before us that these individuals [including Venirepersons White and Ferguson] were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme." Adams, 448 U.S. at 51.

In sum, the Texas Court of Criminal Appeals in this case correctly applied the Adams/Witt "substantial impairment" standard

and did not, directly or indirectly, resurrect the Witherspoon standard. There is no conflict between the Court of Criminal Appeals' decision in this case and any post-Witt decision of any state or federal court. Accordingly, there is absolutely no basis to grant certiorari on Respondent's first question presented.

II.

CERTIORARI SHOULD BE DENIED BECAUSE, CONTRARY TO THE STATE'S CLAIM, THE TEXAS COURT OF CRIMINAL APPEALS AFFORDED APPROPRIATE DEFERENCE TO THE TRIAL COURT'S CONCLUSION THAT VENIREPERSON BROWN'S ANTI-DEATH PENALTY VIEWS "SUBSTANTIALLY IMPAIRED" HER ABILITY TO ABIDE BY HER OATH AS A JUROR.

In its second question presented, the State contends that the Texas Court of Criminal Appeals failed in this case to apply Witt's requirement that appropriate deference be given to a trial court's finding that a prospective capital juror's anti-death penalty views "substantially impaired" her ability to abide by her oath and follow the trial court's instructions to the jury. Again, the State's contention finds absolutely no support in the decision of the court below.

In Wainwright v. Witt, supra, this Court held that a federal court on habeas corpus review must afford a presumption of correctness, see 28 U.S.C. § 2254(d), to a state trial court's finding that a prospective juror's anti-death penalty views "prevent or substantially impair" that person's ability to abide her oath and follow the trial court's jury instructions. See Witt, 469 U.S. at 847 ("This case requires us to ... consider standards for federal courts reviewing [jury selection procedures in capital

cases] upon a petition for a writ of habeas corpus."); id. at 426 ("This case arises from respondent's petition for habeas corpus under 28 U.S.C. § 2254, and therefore a federal reviewing court is required to afford any findings of the state courts on 'factual issues' a 'presumption of correctness' under 28 U.S.C. § 2254(d).").

This Court held that because the determination of whether a venireperson's anti-death penalty views prevent or substantially impair his or her ability to serve as a capital juror often turns on such factors as credibility and demeanor, a trial court's finding that a prospective's views prevent or substantially impair him or her from serving on a capital juror is essentially a factual finding. Accordingly, such a finding is entitled to deference under 28 U.S.C. § 2254(d) unless one of the eight statutory exceptions contained in § 2254(d) apply. See Witt, 469 U.S. at 427-29.

The State contends that Witt's requirement of *federal* habeas deference to a state trial court in this context fully applies to a *state* appellate court on direct review. See *Petition*, at 19 (Witt's "due deference requirement is not limited to cases on collateral review"); id. at 20 (same). According to the State, "[t]he highest criminal courts of many states reviewing cases on direct appeal have recognized that this Court's holding in Witt requires them to defer to the trial court's findings regarding a venire member's ability to serve impartially on a capital murder jury." *Petition*, at 20 (citing cases). Indeed, the State

contends, "the Texas courts themselves have, in the past, held that the trial court's voir dire determinations must be given due deference and reviewed only for abuse of discretion under Witt." *Petition*, at 21 (citing Texas cases).

The State is correct in asserting that certain state courts around the country appear to have held that, on direct review, Wainwright v. Witt *requires* appropriate deference, as a matter of federal constitutional law, to a finding by a trial court that a prospective capital juror's anti-death penalty views would prevent or substantially impair that person's ability to serve as a juror. See, e.g., Pickens v. State, 783 S.W.2d 341, 344-45 (Ark. 1990), cert. denied, 497 U.S. 1011 (1990). However, whether Witt actually *requires* state appellate courts -- as a matter of federal constitutional law -- to afford such deference to a trial court's finding is highly questionable. See Texas v. Mead, 465 U.S. 1041, 1044 n.2 (1984) (Rehnquist, J., dissenting from denial of certiorari, joined by Burger, C.J., & O'Connor, J.) ("The Texas courts are of course free, as a matter of state law, to decide for themselves what deference shall be given by appellate courts to the findings of trial courts [regarding a Adams/Witherspoon issue.]");[6]

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[6] In Mead, a capital case on direct review, then-Justice Rehnquist, the author of the majority opinion in Wainwright v. Witt, contended that this Court should review the Texas Court of Criminal Appeals' decision to reverse a death sentence on the authority of Adams v. Texas and Witherspoon v. Illinois. In that case, the Court of Criminal Appeals, in an explicit manner, refused to afford any deference to the trial court's ruling and instead reviewed the voir dire record in a *de novo* manner on direct appeal. Justice Rehnquist believed that this Court had jurisdiction to review the Texas appellate court's decision

see also State v. Alley, 776 S.W.2d 506, 518 (Tenn. 1988) ("[w]e are not bound to adopt" Witt's requirement of deference to a trial court's ruling, which pivoted on the application of 28 U.S.C. § 2254(d) on *federal* habeas review).

In any event, the question of whether Witt's requirement of *federal* habeas deference to a state trial court's ruling in this context applies equally applies to a *state* appellate court on direct review need not be decided in this case and, thus, is not an appropriate basis for granting certiorari. The Texas Court of

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because the Texas court fairly appeared to hold that it believed that U.S. Supreme Court decisions -- including, most importantly, Witherspoon v. Illinois, supra -- ***required*** complete *de novo* review of the voir dire record without any deference to the trial judge's ruling that a prospective juror was unfit to serve. See Texas v. Mead, 465 U.S. at 1044 n.2, *citing* Mead v. State, 645 S.W.2d 279, 280 (Tex.Crim.App. 1983); Mead v. State, 656 S.W.2d 494, 502 (Tex.Crim.App. 1983) (Campbell, J., dissenting) (on denial of State's second motion for rehearing). That is, Justice Rehnquist believed that the Texas Court of Criminal Appeals' apparent belief that it was *required* by the U.S. Constitution to *forego affording any deference to the trial court* was reviewable by this Court. Justice Rehnquist, however, clearly did not believe that a *state* appellate court's deference to a trial court was *required* as a matter of federal constitutional law. See Mead, 465 U.S. at 1044 n.2 ("The Texas courts are of course free, as a matter of state law, to decide for themselves what deference should be given by [state] appellate courts to the findings of trial courts.").

Unlike in Mead, in the instant case the State is *not* contending in its certiorari petition that the Texas Court of Criminal Appeals erroneously believed that it was *required* -- under the U.S. Constitution -- *to forego affording any deference* to the trial court's ruling regarding Venireperson Brown. And there is absolutely no indication in the opinions of the court below that the Texas appellate court believed that the U.S. Constitution required it to forego affording deference to the trial court.

Criminal Appeals in this case -- as in numerous other cases[7] -- *did* afford Witt-type deference to the trial court. See Riley, 889 S.W.2d at 299 (on rehearing) ("Under the aegis of Wainwright v.

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[7] The State cites four of those post-Witt cases on pages 21-22 of its certiorari petition. In Kinnamon v. State, 791 S.W.2d 84 (Tex.Crim.App. 1990), the Texas Court of Criminal Appeals court held, without any dissent, that:

> [W]hile we are not bound by [28 U.S.C.] § 2254(d), Witt clarified the doctrine set forth in Adams and Witherspoon, neither of which was a federal habeas corpus case. Nothing in Witt suggests that the standard therein was designed to be limited to peculiar federal procedural grounds. Moreover, relative to the Supreme Court's statement in Witt that "deference must be paid to the trial court who hears and sees the juror," [citation omitted], Texas cases predating Witt [afforded] deference to the trial court's ruling on prospective jurors. [citing numerous cases].

Kinnamon, 791 S.W.2d at 99 n.8.

For the reasons stated by Chief Justice Rehnquist in his dissent in Texas v. Mead, supra, Respondent does not agree that a state appellate court is *required* by Witt to afford § 2254(d)-type deference to a trial court's ruling. Petitioner respectfully submits that the Texas appellate court in Kinnamon failed to appreciate that this Court in Witt discussed both the relevant substantive standard (*i.e.*, the "substantial impairment" standard) *and* the § 2254(d) issue in separate parts of this Court's opinion in Witt. See Witt, 469 U.S. at 418-26 (discussing "substantial impairment" standard); id. at 426-30 (discussing separate § 2254(d) issue). Obviously, only the former portion of Witt applies to state appellate courts under the Supremacy Clause. Nevertheless, the Court of Criminal Appeals' statement in Kinnamon, however erroneous it may be as a matter of federal constitutional law, is evidence that the Texas Court of Criminal Appeals does regularly afford due deference to trial courts' rulings on Adams/Witt issues in capital cases. Thus, even assuming *arguendo* that Witt's "due deference" holding does apply to state appellate courts on direct review, as well as to federal habeas courts, the instant case is not an appropriate one in which to grant certiorari in order to expressly extend Witt's holding to state appellate courts since the Texas appellate court afforded such deference in the instant case.

Witt, supra, this Court has long deferred to a trial court's judgment about vacillating veniremen, whether that judgment is that the venireman is substantially impaired or that he is not."); id. at ("Of course we defer to the trial court's judgment when confronted with a record that reveals true equivocation or vacillation on the question whether, despite conscientious scruples against the death penalty, a venireman can abide by and follow the law. ... But a venireman such as Brown, who steadfastly insists that she can follow the law irrespective of the damage it may do to her conscience, leaves nothing to the discretion of the trial court, for she has provided no basis to conclude she is challengeable for cause....").

In this case, the Court of Criminal Appeals, in both applying Witt's "substantial impairment" substantive standard and affording Witt-type due deference to the trial court after reviewing the record as a whole, simply concluded that the trial court abused its discretion by granting the State's challenge for cause. See Riley, 889 S.W.2d at 297 (on original submission) ("A veniremember may not be excluded from jury service based solely on his opinion of the death penalty *when the record clearly demonstrates he is capable of following the law.*") (citing Adams and Witt) (emphasis added); id. at 301 (on rehearing) ("The record present[ed] no basis for the trial court to conclude [Venireperson Brown] was substantially impaired, and its conclusion that she was [so impaired] constituted an abuse of discretion. Under these circumstances it would be anomalous, to say the least, to defer to the trial court,

Wainwright v. Witt notwithstanding.").[8]

The State's apparent contention that a trial court's ruling that a prospective juror should be struck for cause *anytime* that he or she "vacillates" or "equivocates" during his or her voir dire testimony -- including at the beginning of voir dire when the prospective juror is unaware of how a state's capital sentencing scheme operates and thus cannot provide a meaningful answer to questioning -- finds no support in Witt or its progeny. See, e.g., Gray v. Mississippi, 481 U.S. 648, 669 (1987) (Powell, J., concurring) ("The facts of this case show that Mrs. Bounds, although at times confused [about whether she could abide by her oath notwithstanding her anti-death penalty views], *finally stated explicitly that she would carry out her duty as a juror.* Cf. Wainwright v. Witt, ...") (emphasis added); id. at 659 (plurality) (finding violation of Adams and Witt). In this case, once the prosecutor and defense counsel fully explained to Venireperson Brown about Texas' unique "special issue" sentencing scheme, "[s]he testified unequivocally that her opposition to the death penalty

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[8] In effect, the Texas Court of Criminal Appeals held that the trial court's factual finding regarding Venireperson Brown was "clearly erroneous" in light of the record as a whole. Cf. Hernandez v. New York, 111 S. Ct. 1859 (1991) (applying a "clearly erroneous" standard to trial court's ruling under Batson v. Kentucky, 476 U.S. 79 (1986)); Fed. R. Civ. Pro. 52(a). In the interests of federalism and comity, this Court should not disturb such a case-specific conclusion by a state appellate court. Indeed, a state appellate court's conclusion that a trial court's finding is "clearly erroneous" in light of the record as a whole is itself factual in nature and, thus, arguably is entitled to deference by a federal court, including this Court on direct review. Cf. 28 U.S.C. § 2254(d).

would not substantially impair her ability to follow her oath and render a true [punishment] verdict." Riley, 889 S.W.2d at 297 (on rehearing).[9]

Even assuming *arguendo* that the Texas Court of Criminal Appeals, in conscientiously applying Witt and Adams, somehow erred in this particular case, it would still not be appropriate to grant certiorari in order to correct such a case-specific error. It is axiomatic that, when a lower court attempts to apply well-established legal standard in a good-faith manner and simply errs in so doing, this Court should not expend its precious resources in granting certiorari in order to correct the error. See Robert L. Stern *et al.*, Supreme Court Practice, at 163-64 (7th ed. 1993). Moreover, certiorari should be denied because in this case the State's arguments about why review is appropriate pivot on the State's parsing of Venireperson Brown's voir dire testimony. See, e.g., United States v. Johnson, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."). The State's attempt, in its certiorari petition, to rise above such

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[9] The trial court's additional finding that Ms. Brown's anti-death penalty views might cause her to hold the prosecution to a higher standard of "reasonable doubt" than she would in a non-capital case is not a constitutionally permissible reason to exclude her for cause. See Adams v. Texas, 448 U.S. at 50 ("Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a capital murder trial if they aver that they will honestly find the facts and answer the [special issues] in the affirmative if they are convinced beyond a reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be *or what they may deem to be a reasonable doubt.*") (emphasis added).

a record-specific controversy -- by characterizing the Court of Criminal Appeals' ruling in this case as being in conflict with decisions of this Court, as well as state and federal lower courts, on broad legal principles -- simply does not succeed.

Finally, further assuming *arguendo* that the court below did error, it would be inappropriate to grant certiorari because the number of Texas cases affected by any error committed by the court below is negligible at best. As the Court of Criminal Appeals correctly noted on rehearing, the sentencing scheme under which Respondent was sentenced to death, TEX. CODE CRIM. PRO. Art. 37.071 (Vernon's ed. 1989), has been radically amended since the time of Respondent's trial. See Riley, 889 S.W.2d at 301 n.4. The present sentencing scheme -- which has been in effect since 1991 -- contains a broad "Penry special issue"[10] that would likely render a prospective juror such as Ms. Brown excludable for cause under Wainwright v. Witt, supra. See TEX. CODE CRIM. PRO. Arts. 37.071 & 37.0711 (Vernon's ed. 1994)

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[10] See Penry v. Lynaugh, 492 U.S. 302 (1989).

CONCLUSION

Accordingly, because this Court is not a court-of-error and further because the court below committed no error in any event, the State's petition for writ of certiorari to the Texas Court of Criminal Appeals should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William C. Wright, a member of the Bar of this Court, hereby certify that a true and correct copy of this Brief in Opposition has been served by U.S. mail on counsel for the State, Gena A. Blount, Assistant Attorney General, Texas Attorney General's Office, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

William C. Wright

Michael Lynn RILEY, Appellant,
v.
The STATE of Texas, Appellee.

No. 69738.
Court of Criminal Appeals of Texas, En Banc.

Nov. 10, 1993.
Rehearing Denied Feb. 9, 1994.
Opinion Overruling Motion for Rehearing Dec. 21, 1994.

Defendant was convicted of capital murder and sentenced to death following jury trial in the 114th Judicial District Court, Wood County, Galloway Calhoun, J. On automatic appeal, the Court of Criminal Appeals, Baird, J., held that challenge for cause to venireperson because of her opposition to death penalty was improperly sustained where venireperson consistently and unequivocally stated that she could answer statutory punishment issues affirmatively if proven beyond a reasonable doubt, despite conscientious objections to death penalty. On rehearing, the Court of Criminal Appeals, Clinton, J., adhered to its original determination and further held that so long as venireman affirms that she can in fact answer special issues in accordance with the evidence, neither difficulty she may have in doing so nor fact that it might violate her conscience renders her a "vacillating venireman" so as to require deference to determination of the trial court.

Reversed and remanded and motion for rehearing overruled.

Miller, J., dissented on original submission.

On original submission, Campbell, J., dissented with note in which McCormick, P.J., and White, J., joined.

Campbell, J., dissented on rehearing.

On rehearing, White, J., filed dissenting opinion in which McCormick, P.J., and Miller, J., joined.

On State's Motion for Rehearing

OPINION

BAIRD, Judge.

Appellant was convicted of capital murder pursuant to Tex.Penal Code Ann. Sec. 19.03(a)(2). (FN1) The jury affirmatively answered the three issues submitted under Tex.Code Crim.Proc.Ann. art. 37.071(b). (FN2) Punishment was assessed at death. Id. at (e). Appeal to this Court is automatic. Id. at (h). We will reverse.

As appellant does not challenge the sufficiency of the evidence, we will dispense with a recitation of any facts unnecessary to the resolution of the point of error under consideration. In point of error six, appellant contends Veniremember Bulah Brown was improperly excluded from jury service because her views on the death penalty would not have "substantially impaired" her performance as a juror.

I. Adams v. Texas

In Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), the Supreme Court held former Texas Penal Code Section 12.31(b) may not be used to exclude veniremembers who acknowledge they "might" be affected by the death penalty. (FN3) Adams, 448 U.S. at 49, 100 S.Ct. at 2528. A potential juror may not be challenged for cause based upon his views about capital punishment unless those views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Adams, 448 U.S. at 45, 100 S.Ct. at 2526.

In Adams, seven veniremembers were excluded from jury service because they were unable to take an oath that the mandatory penalty of death or imprisonment for life would not affect their deliberations. Adams, 448 U.S. at 40, 100 S.Ct. at 2524. Our review of the record in Adams reveals two veniremembers testified similarly to Brown and will, therefore, provide guidance for our analysis of this case.

Veniremember White

White testified although she believed in capital punishment, she could not participate in a proceeding in which the death penalty was handed down. White felt the mandatory sentence of death or life would affect her deliberations in a case. The trial judge asked White if she could ever, in a capital murder case, vote

yes to all three statutory punishment issues if evidence had proven them, and White responded, "I don't think so." (FN4) Upon further examination, White finally stated she could set aside her feelings and vote "yes" to the statutory punishment issues if the facts justified it. However, at the end of her testimony White vacillated on this issue. When defense counsel again asked White if she could lay her feelings aside and answer the questions honestly she replied, "I did but I cannot say yes to that now. That is not--I couldn't lay my feelings aside."

Veniremember Ferguson

Ferguson testified he was opposed to capital punishment. Ferguson felt it would be "almost impossible" for him to render a death penalty verdict, and stated he had "grave doubts" about ever being able to vote for death. Ferguson could not conceive of a case wherein he would vote for the death penalty. When asked if he would "automatically" vote against the death penalty, Ferguson replied, "With my conscious, yes."

After an explanation of the Texas statutory punishment issues, Ferguson testified he thought he could honestly try to answer the questions but he did not want to vote for the death penalty. Ferguson again testified he felt he would automatically vote against the death penalty. Upon further examination, the trial judge asked:

Trial Judge: Is what you're saying, knowing he would go to the electric chair, are you saying that would affect your ability to answer those questions?

Ferguson: It wouldn't affect my ability, but it would cause me to do some squirming trying to be honest in my answers if I felt like the answers to the three questions was yes.

At the conclusion of both White's and Ferguson's testimony, the trial judge sustained the State's challenges for cause. We affirmed. Adams v. State, 577 S.W.2d 717 (Tex.Cr.App.1979).

The Supreme Court held the exclusion of the veniremembers was improper. The Court reasoned a juror's performance could be influenced by his views on the death penalty without exceeding " 'guided jury discretion' ". Adams, 448 U.S. at 47, 100 S.Ct. at 2527. Thus, "if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." Adams, 448 U.S. at 48, 100 S.Ct. at 2528, citing Witherspoon v. Illinois, 391 U.S. 510, 522, n. 21, 88 S.Ct. 1770, 1777, n. 21, 20 L.Ed.2d 776 (1968). Such exclusion violates the Sixth and Fourteenth Amendments to the U.S. Constitution. Adams, 448 U.S. at 50, 100 S.Ct. at 2529. In emphasizing the breadth of its holding the Court stated:

... Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

Id.

II. Application By This Court

We have considered Adams on numerous occasions, namely, Cuevas v. State, 641 S.W.2d 558 (Tex.Cr.App.1982); Turner v. State, 635 S.W.2d 734 (Tex.Cr.App.1982); Durrough v. State, 620 S.W.2d 134 (Tex.Cr.App.1981); Pierson v. State, 614 S.W.2d 102 (Tex.Cr.App.1981). Two cases in particular, Cuevas and Durrough, contain testimony similar to that of Brown and will, therefore, be discussed in detail.

In Cuevas, 641 S.W.2d at 560, the veniremember testified "that under no circumstances could he participate as a juror in returning a verdict that would require the court to assess the death penalty." After an explanation of the Texas statutory punishment issues, the veniremember testified:

Trial Judge: Now, you have expressed an objection to the death penalty. Would you feel that your conscientious objection to the death penalty as such, that it would affect your deliberation upon his guilt in the first instance or on either of the questions of fact, on those questions that I asked?

Veniremember: No.

* * * * * *

Trial Judge: You believe you can successfully set that aside and base you answers solely and exclusively upon the evidence you hear in the trial of the case?

Veniremember: Yes, sir.

* * * * * *

Prosecutor: So you are saying the fact that the death penalty is a possible punishment, that fact would influence you in your decision as to how you answer these two punishment questions, right?

Veniremember: It probably would. Yes.

Prosecutor: Could you say yes or no?

Veniremember: Yes. Of course, it would certainly be in my mind, surely, it would influence me.

* * * * * *

Veniremember: ... I would try to be as fair as possible, but I do have–

Prosecutor: If you were that opposed to the death penalty, I could understand how it would affect you, and you just told me it would.

Veniremember: Sure it would.

* * * * * *

Defense Counsel: Even though a juror feels that way, and I think it's proper that they should certainly be concerned about this life or death issue, but if you could answer yes to those questions if the State convinced you beyond a reasonable doubt that the answers should be yes, then you should serve and do your duty as a juror.

Veniremember: That's right.

Defense Counsel: Can you do that?

Veniremember: Yes.

Defense Counsel: So it would depend on the evidence that you heard?

Veniremember: Yes.

Defense Counsel: And if you were convinced beyond a reasonable doubt, it wouldn't affect your feelings on the death penalty, you'd answer those questions yes or no and let the chips fall where they may?

Veniremember: Yes.

Defense Counsel: Is that correct?

Veniremember: That is true. It will be very unpleasant, but I will do it.

* * * * * *

Prosecutor: ... I assume ... that your feeling against the death penalty would affect your deliberation how to answer those [statutory punishment issues].

Veniremember: Yes.

Prosecutor: It would?

Veniremember: Yes.

* * * * * *

Prosecutor: If that's the case, I take it that you could not state under oath that the mandatory penalty of death would not affect your deliberations in the punishment part?

Veniremember: Now, I understand what you are saying. I could not take that.

Prosecutor: You couldn't take that oath?

Veniremember: No. I couldn't do that.

At the conclusion of the veniremember's testimony, the trial judge sustained the State's challenge for cause. Id. at 562. We held the exclusion was improper under Witherspoon and Adams:

> ... [The veniremember] could not have been excluded consistently with Witherspoon. He repeatedly stated that he could follow the law and convict upon proper evidence of guilt beyond a reasonable doubt, despite his opposition to the death penalty.
>
> * * * * * *
>
> This exclusion of [the veniremember] was precisely the kind of exclusion forbidden by the Supreme Court in Adams. If even one juror is improperly excluded under the Witherspoon line of cases, the State cannot execute an appellant. Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339.

Id. at 563.

In Durrough, 620 S.W.2d at 140, the veniremember testified she had conscientious scruples against the death penalty:

Trial Judge: Does that mean you could not in a proper case if you felt the facts warrant it, vote for a verdict that would result in the Death Penalty being inflicted?

Veniremember: I don't think in all consciousness [sic] I could.

Trial Judge: I can't hear you?

Veniremember: I don't think in all consciousness [sic] I could vote for someone to, for me to inflict death on any human being. I don't think I could.

Trial Judge: All right. Are you saying that you couldn't do this in any case, regardless of the facts?

Veniremember: I don't think I could. No.

After an explanation of the Texas statutory punishment issues, the veniremember testified:

Defense Counsel: Okay. Now, could you decide those [punishment issues] based on the evidence and follow the law in that respect?

Veniremember: I could follow the law but I would still feel responsible. Morally responsible.

Defense Counsel: Well, I feel you might feel morally responsible but what I'm asking you however you feel in the end when it's all over, could you follow the law and answer those questions based only on the evidence?

Veniremember: Yes. I could.

* * * * * *

Defense Counsel: [C]ould you ... be a juror and make or base your decision only on the evidence, that's it?

Veniremember: I could but I would still like I said, I would still feel morally responsible. I really would. I will I would still feel morally responsible.

At the conclusion of the veniremember's testimony, the trial judge sustained the State's challenge for cause. Id. at 142. We held the exclusion was improper under Adams:

It does not appear from the record that [the veniremember] was so irrevocably opposed to capital punishment that she could not follow the law or obey the instructions of the trial court. To the contrary Scott repeatedly stated that she could answer the questions put to her based on the evidence presented at the punishment phase of the trial. We conclude that V.T.C.A. Penal Code, Section 12.31(b) was applied by the trial court in the instant case to exclude a prospective juror whose only fault was to acknowledge honestly that she had conscientious scruples against capital punishment and that the mandatory penalty of death or imprisonment for life might affect her deliberations. On this state of the record to hold that the exclusion for cause of [the veniremember] from jury service contravened the Sixth and Fourteenth Amendments. Adams v. Texas, [citation omitted].

Id.

[1] As exemplified by Cuevas and Durrough, we have consistently held that a potential juror may not be challenged for cause based upon his views about capital punishment unless those views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Adams, 448 U.S. at 45, 100 S.Ct. at 2526. In other words, unless a veniremember is so irrevocably opposed to capital punishment that he could not follow the law or obey the instructions of the trial court, he is not disqualified from jury service. Durrough, 620 S.W.2d at 142.

III. Facts of the Present Case

[2] In the present case Brown testified she strongly opposed the death penalty and could not participate in a proceeding in which the death penalty was handed down. However, after an explanation of the Texas statutory punishment issues, Brown testified as follows:

State: I want you to assume at this point that you are a juror in a capital murder case and that the jury has returned a verdict of guilty, and you are now deliberating punishment. The State has brought you evidence that has convinced [you] beyond a reasonable doubt that the answer to each of those questions should be yes, based upon the evidence that you have heard. Now, I want to remind you that you have taken an oath that you will render a true verdict based upon the law and the evidence. So, if you followed your oath, you would answer yes, would you not, to each of those questions?

Brown: Yes.

State: But because of your religious, moral objections to the death penalty, you would be sentencing that Defendant to death, would you not, if you answered yes?

Brown: Yes.

State: You would, of course, then be asked, or forced, if you followed your oath, to sacrifice those moral, religious and personal feelings, would you not?

Brown: Yes, I would.

State: Could you do that?

Brown: I guess I would have to.

* * * * * *

State: Knowing that you have deep-seated religious beliefs against the death penalty ... would those feelings prevent you, or substantially impair your ability to follow your oath as a juror and render a verdict based upon the evidence and the law as given to you?

Brown: No.

State: They would not?

Brown: (Shaking head.)

State: In other words, you're willing to sacrifice those beliefs?

Brown: Yes.

State: You would give up those beliefs, as deep-seated as they are?

Brown: Yes.

* * * * * *

When questioned by appellant the following exchange occurred.

Appellant: The first [statutory punishment issue] comes to the jury and it says: Was the conduct of the Defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result ... And if you believe from the evidence that this question should be answered yes, could you answer yes?

Brown: Yes.

Appellant: All right. Special issue Number 2 talks about whether or not there's a probability that the Defendant ... would commit criminal acts of violence that would constitute a continuing threat to society ... [I]f that had been proven to you beyond a reasonable doubt ... could you answer yes to that question? Brown: Yes.

Appellant: And we're not sure about [statutory punishment issue] Number 3. We don't know if in the facts in this case would come up, but it could very well come up in a certain type of case. And that is: If the conduct of the Defendant, in killing the deceased, was unreasonable in response to the provocation, if any, by the deceased ... [I]f there was enough evidence to convince you beyond a reasonable doubt that this question should be answered yes, could you answer that question yes?

Brown: Yes.

At the conclusion of Brown's testimony, the trial judge sustained the State's challenge for cause, over appellant's timely objection. In support of his ruling, the trial judge stated:

Gentlemen, on the State's challenge, in view of the juror's repeated statements of moral and personal religious opposition to the death penalty, and on the Court's finding that, taken at best, the juror would have to overcome her moral and religious personal prejudice against the death penalty in order to perform her duty, the Court feels that the juror's views; personal, religious and moral, with regard to the death penalty, would substantially impair the performance of her duties as a juror if selected, the Court will sustain the challenge for cause....

IV. Application

Adams and its progeny control the resolution of this point of error. In comparing Brown's testimony to that of Ferguson and White in Adams, it is clear to us Brown was a qualified juror. The Adams Court held Ferguson and White were qualified jurors despite their inability to unequivocally state they could answer the statutory punishment issues according to the evidence. (FN5) Brown, however, consistently and unequivocally stated she could answer the statutory punishment issues affirmatively if proven beyond a reasonable doubt. Because Brown's testimony is even less questionable than Ferguson's and White's, it is clear Brown was excluded on a "broader basis than [her] inability to follow the law...." in violation of the Sixth and Fourteenth Amendments. Adams, 448 U.S. at 48, 100 S.Ct. at 2528.

Our holdings in Cuevas and Durrough also support this conclusion. Like the veniremembers in Cuevas and Durrough, Brown expressed her opposition to the death penalty but stated she could set aside her feelings and reach a verdict based solely on the evidence. Despite her feelings towards the death penalty, Brown was not so "irrevocably opposed" to capital punishment as to be unable to follow the law in reaching a verdict. Durrough, 620 S.W.2d at 142. (FN6)

Finally, our conclusion of Brown's improper exclusion is supported by the trial judge's own words when ruling on the State's challenge to Brown. The trial judge clearly stated he was excluding Brown because of her "moral and personal religious opposition to the death penalty." This action was improper because Brown testified that she would not disobey the law or the jury instructions by answering the statutory punishment issues negatively in order to avoid rendering the death penalty. Durrough 620 S.W.2d at 142. The fact that Brown's views on the death penalty could have affected her performance was not sufficient grounds to disqualify her. Adams, 448 U.S. at 47, 100 S.Ct. at 2527. A veniremember may not be excluded from jury service based solely on his opinion of the death penalty when the record clearly demonstrates he is capable of following the law. Adams, 448 U.S. at 49, 100 S.Ct. at 2528; Cf. Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (uncertainty in the record due to ambiguous questions as to whether a veniremember's views would "interfere" with her role as a juror requires deference to the trial judge's ruling on qualification).

For the foregoing reasons, we sustain appellant's sixth point of error. The judgment is reversed, and this case is remanded to the trial court.

MILLER, J., dissents.

CAMPBELL, J., dissents for the reason that the venireperson exemplified the responses of a classic, vacillating juror as explicated in Wainwright v. Witt.

McCORMICK, P.J., and WHITE, J., join this note.

OPINION ON STATE'S MOTION FOR REHEARING

CLINTON, Judge.

On original submission in this cause we sustained appellant's sixth point of error, and reversed his conviction. In that point of error appellant argued that the State's challenge for cause against venireman Bulah Brown was erroneously granted. We held that the trial court had indeed erred to exclude Brown from jury service because the excusal was predicated upon nothing more than her moral and religious scruples against the death penalty. In so holding we placed principal reliance upon Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), and two cases out of this Court, Cuevas v. State, 641 S.W.2d 558 (Tex.Cr.App.1982) and Durrough v. State, 620 S.W.2d 134 (Tex.Cr.App.1981). In its motion for rehearing, the State now contends that we erred on original submission in failing adequately to account for the subsequent opinion from the United States Supreme Court in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The State also complains that we have effectively overruled our own opinions in such cases as Farris v. State, 819 S.W.2d 490 (Tex.Cr.App.1990), Vuong v. State, 830 S.W.2d 929 (Tex.Cr.App.1992), and Gunter v. State, 858 S.W.2d 430 (Tex.Cr.App.1993). We granted the State's motion for rehearing in order to address these contentions.

Venireman Brown frankly acknowledged she did not believe in the death penalty. She opined, "I say God put people on this earth to live, not for other folks just to do away with their lives. If they should die, He will do it." She agreed that she "personally could not participate in any proceeding that ultimately decreed and handed down a death sentence." After the special issues were explained to her, however, Brown was asked whether she could answer them affirmatively if the evidence called for it, despite her misgivings about the death penalty. She responded that if she had taken an oath to do so, she would "have to" sacrifice her conscientious objections to the death penalty, and answer the special issues in accordance with the evidence. She testified unequivocally that her opposition to the death penalty would not substantially impair her ability to follow her oath and render a true verdict. (FN1) Although Brown admitted that this scenario would create a "deep conflict between what [she] would be required to do as a juror and what [her] personal feelings regarding the death penalty were," and that affirmative answers would effectively "violate [her] moral and religious beliefs," she never wavered in her assurances that she could nonetheless give affirmative answers to the special issues if the evidence convinced her beyond a reasonable doubt they should be so answered. In this respect, she neither equivocated nor vacillated.

On original submission we pointed out that, like the veniremen in Cuevas and Durrough, both supra, venireman Brown stated unequivocally that she could set aside her scruples against the death penalty and answer the questions honestly in accordance with the evidence. As with venireman Ward in Cuevas, we held that Brown was not challengeable for cause in spite of acknowledging "that under no circumstances could [she] participate as a juror in returning a verdict that would require the court to assess the death penalty." Maj. op. at 293, quoting Cuevas, 641 S.W.2d at 560. To hold otherwise, we reasoned on original submission, would violate the prohibition in Adams against excusing veniremen "on any broader basis than their inability to follow the law or abide by their oaths[.]" 448 U.S. at 48, 100 S.Ct. at 2528, 65 L.Ed.2d at 591 (internal quotation marks omitted). Accordingly, we reversed appellant's conviction and remanded the cause.

The State argues that we have failed to take into account the entire voir dire examination of venireman Brown. Examining that voir dire in its entirety reveals, contends the State, that Brown had "conflicting feelings regarding the law," and under those circumstances the appellate court should defer to the trial court's ruling. Gunter v. State, supra, at 444, quoting Farris v. State, supra, at 501. Unless we have overruled Gunter and Farris sub silentio, maintains the State, we have erred to reverse the instant conviction. And to overrule those cases, the State submits, would be inconsistent with the Supreme Court's opinion in Wainwright v. Witt, supra. Although we believe our opinion in Gunter is distinguishable on its facts, we agree with the State that our disposition on original submission is inconsistent with our opinion in Farris. However, for reasons about to be given, we believe Farris was wrongly decided, Wainwright v. Witt notwithstanding, and hereby expressly overrule it.

In Wainwright v. Witt, supra, the Supreme Court laid to rest the infamous footnote 21 from Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), which had been construed to require that as a predicate to exclusion of a venireman on the basis of conscientious scruples against the death penalty, a state must demonstrate with "unmistakable clarity" that the venireman would "automatically" reject the possibility of imposing a sentence of death. In its stead the Supreme Court solidified the standard announced in Adams v. Texas, supra, viz: that a venireman may be challenged consistent with the Sixth Amendment upon a finding that his opposition to the death penalty would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Of course, the Supreme Court had already made it clear in Adams itself that whatever reservations a venireman might harbor toward the death penalty could not justify excluding him, even under the "substantial impairment"

standard, so long as he maintains unswervingly that his reservations will not prevent him from answering the special issues to the best of his ability in accordance with the evidence, without conscious distortion or bias. A venireman who can do this is a venireman who can do all that the law requires. (FN2) From the time the operation of the special issues was explained to her, venireman Brown steadfastly maintained she could take the oath and answer the special issues honestly, according to the evidence, even though to do so would violate her conscience. The record thus establishes she could follow the law; there is no basis to support a conclusion otherwise. Our holding on original submission is therefore fully in keeping with the standard announced in Adams and reiterated in Witt.

The State argues, however, that we have failed to give the deference that is due the trial court's conclusion that the venireman was substantially impaired. (FN3) According to the State, we did not take account of the entirety of Brown's voir dire, and had we done so, we would have found ample support in the record for the trial court's conclusion that she was substantially impaired. In particular, we failed to effectuate Brown's statement that she could never participate in a proceeding that might eventually result in imposition of the death penalty, her frank and consistent acknowledgments that to follow her oath and answer the special issues honestly would, if her answers were affirmative, violate her moral and religious beliefs, and her failure to accept that death might ever be an acceptable penalty. At best Brown was, in the State's assessment, a vacillating venireman. Under the aegis of Wainwright v. Witt, supra, this Court has long deferred to a trial court's judgment about vacillating veniremen, whether that judgment is that the venireman is substantially impaired or that he is not. E.g., Perillo v. State, 758 S.W.2d 567, at 577 (Tex.Cr.App.1988). The State believes we have violated that principle here. We disagree.

[3] It is true that Brown affirmed in response to leading questions that she could never participate in a proceeding that might result in imposition of a sentence of death. These leading questions came, however, before it was ever explained to Brown how the sentence of death is imposed in Texas. From the time it was explained to her that the jury simply responds to special issues at the punishment phase, she acknowledged that even though it would be "difficult," and that it would clearly "violate her moral and religious beliefs," she would answer the special issues "yes" if the evidence called for it. That it would be difficult, or even that it would unquestionably violate her conscience, however, does not lend support to a finding that Brown was substantially impaired, for this is no more than a simple acknowledgment that her attitude toward the death penalty would "affect" her deliberations. Adams v. Texas, supra, 448 U.S. at 49-50, 100 S.Ct. at 2528-2529, 65 L.Ed.2d at 592-93. So long as she consistently affirmed that she could in fact answer the special issues in accordance with the evidence, neither the difficulty she may have in doing so, nor the fact it might violate her conscience, renders her a "vacillating" venireman in any material sense. The dispositive question under Adams is simply whether she could follow the law, notwithstanding her staunch opposition to the death penalty. In that, Brown was unyielding--she could.

The State insists that our conclusion that Brown was not a vacillating venireman is at odds with our dispositions in Gunter and Farris. In Gunter, however, venireman Frede first stated she could not answer the special issues affirmatively even if the evidence convinced her she ought to. Later she answered that she could. Because she gave conflicting answers to what after Adams must be considered the dispositive question, Frede was truly a vacillating venireman. Under those circumstances it is only appropriate to defer to the trial court's judgment. See Perillo v. State, supra. Our resolution of this cause on original submission is thus not inconsistent with the result, at least in Gunter.

But our opinion in Gunter did rely in large measure for authority on Farris, and Farris is another story. In Farris venireman Goodson testified she could never "return a verdict which assessed the death penalty." Acknowledging that it would violate her conscience to do so, Goodson nevertheless insisted she would not violate her oath to render a true verdict, and unambiguously and unwaveringly insisted she would answer the special issues honestly and in accordance with the evidence. Thus, in every material aspect her voir dire testimony was identical with venireman Brown's in the instant cause. Yet in Farris we observed that Goodson "vacillated." 819 S.W.2d at 501. And in Gunter we again described Goodson as having been a vacillating venireman, and observed that deference to the trial court was the proper course in the premises. 858 S.W.2d at 443-44. Manifestly the State is correct that our opinion on original submission in this cause is in conflict with our opinions in Gunter and Farris, notwithstanding our footnote 6, maj. op. at 296, in which we purported to distinguish Farris. We now recognize that we must either follow Farris or forsake it.

[4][5] We cannot follow it. A venireman who unflinchingly insists she can answer the special issues according to the evidence does not "vacillate" when she frankly acknowledges that to do so will violate her conscience should she have to answer the questions in a way that assures death will be imposed. To defer to the trial court's judgment that such a venireman is substantially impaired is to give the trial court carte blanche to excuse her on the basis of nothing more than what Farris

characterized as "conflicting feelings regarding the law, the juror's oath, and capital punishment[.]" 819 S.W.2d at 501. If Adams makes anything clear, it is that "conflicting feelings" about the death penalty do not disqualify the venireman who is able to put those feelings aside and impartially serve the simple factfinding function called for under the special issues. To allow a State's challenge for cause on any broader basis than the venireman's ability to find facts, as the late Judge Teague put it in his dissenting opinion in Farris, supra, at 508, "simply will not do." Of course we defer to the trial court's judgment when confronted with a record that reveals true equivocation or vacillation on the question whether, despite conscientious scruples against the death penalty, a venireman can abide by and follow the law. Wainwright v. Witt, supra; Perillo v. State, supra. But a venireman such as Brown, who steadfastly insists she can follow the law irrespective of the damage it may do her conscience, leaves nothing to the discretion of the trial court, for she has provided no basis to conclude she is challengeable for cause.

In another context Judge Teague observed that, consistent with Adams, "[a] juror may not be excluded merely because there is difficulty in resolving questions of fact, even when that difficulty is exacerbated by a sensitive conscience. Only when there is a substantial likelihood that he will balk at the task or falsify an answer should he be judged unqualified." Hernandez v. State, 757 S.W.2d 744, at 752-53 (Tex.Cr.App.1988) (Plurality opinion). The Farris Court dismissed Hernandez in a footnote. 819 S.W.2d at 501-502, n. 3. Later, in Fuller v. State, 829 S.W.2d 191, at 200 (Tex.Cr.App.1992), the Court consigned Hernandez to oblivion. We now expressly overrule our holding in Farris, disapprove of our reliance upon Farris in Gunter, and resurrect the above principle from Hernandez. Brown gave no indication she would "balk" at the prospect of taking her oath, nor that she might falsify answers to the special issues to protect her conscience. The record presents no basis for the trial court to conclude she was substantially impaired, and its conclusion that she was constituted an abuse of discretion. Under these circumstances it would be anomalous, to say the least, to defer to the trial court, Wainwright v. Witt notwithstanding.

[6] Finally, the State argues that reversal of this cause is inconsistent even with the language of Adams itself. It is true that in Adams the Supreme Court observed in passing that in order to be able to follow the law in Texas a venireman in a capital case must be able, inter alia, "to accept that in certain circumstances death is an acceptable penalty[.]" 448 U.S. at 46, 100 S.Ct. at 2527, 65 L.Ed.2d at 590. But as Judge Teague cogently explained in Hernandez, supra, at 752, n. 16, the Supreme Court to this extent has simply mischaracterized Texas law. Under former Article 37.071, V.A.C.C.P., any venireman who could answer the special issues according to the evidence, without conscious distortion or bias, could follow the law, irrespective of his willingness to "accept" the death penalty in the abstract. See n. 2, ante. As long as his rejection of the death penalty, however categorical, did not substantially impair his ability to abide by his oath to render a true verdict, it did not make him challengeable for cause under our law. "He need not himself favor the penalty under any circumstances." Hernandez, supra at 752. (FN4)

The State's motion for rehearing is overruled.

CAMPBELL, J., dissents.

DISSENTING OPINION ON STATE'S MOTION FOR REHEARING

WHITE, Judge, dissenting.

I dissent to the majority's decision to overrule the State's motion for rehearing in the instant cause, to the majority's decision to overrule this Court's holding in Farris v. State, 819 S.W.2d 490 (Tex.Cr.App.1990), and to the majority's disapproval of this Court's reliance upon Farris in Gunter v. State, 858 S.W.2d 430 (Tex.Cr.App.1993).

In its motion for rehearing, the State argues "a review of Brown's entire testimony reveals she testified that her opposition to the death penalty would prevent her from participating in any proceeding in which the death penalty was assessed, stated that her views would impair her ability to follow her oath, and indicated she was not willing to accept that in certain circumstances death is an acceptable penalty." The State contends this Court's decision on original submission "cannot be squared with this Court's previous decisions," citing Gunter v. State, Vuong v. State, 830 S.W.2d 929 (Tex.Cr.App.1992); and Farris v. State; among others. The majority, conceding that Brown's voir dire in the instant cause cannot be distinguished from the voir dire of venireperson Goodson in Farris, resolves the State's contention by overruling our holding in Farris and claiming that Gunter is distinguishable on the facts.

I disagree with the majority's assessment of the voir dire of Brown in the instant case and of Goodson in Farris, and the comparison to the voir dire in Gunter. In each of these cases, the record of the testimony of the venirepersons in question revealed their conflicting answers which demonstrated their equivocation, vacillation and uncertainty. In our review of the records of these three cases, we are obligated to "defer to the trial judge who had the opportunity to observe and evaluate components that are insightful to the juror's views but which are

not reflected on the face of the record, such as demeanor, inflection, and expression." Cooks v. State, 844 S.W.2d 697, at 713-715 (Tex.Cr.App.1992).

A method of review, as set out in Gunter, Farris, Vuong and Cooks, would be in line with the precedent set by the Court in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) and Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). When faced with a record where a venireperson has given conflicting answers, thereby demonstrating equivocation, vacillation or uncertainty, this Court should grant considerable deference to the decision of the trial court who had the opportunity to directly observe the demeanor of the venireperson. Until today, this has been the method relied upon by this Court. See Goodwin v. State, 799 S.W.2d 719, at 731 (Tex.Cr.App.1990); Farris v. State, 819 S.W.2d at 501; Vuong v. State, 830 S.W.2d at 943, and cases cited therein; Cooks v. State, 844 S.W.2d 697, at 713-715; and Gunter v. State, 858 S.W.2d at 443.

The majority's decision today represents not only a breach of stare decisis, but a return to the days when this Court engaged in appellate re-evaluation of voir dire records in a dangerous revisionist approach to the assessment of the rulings of trial courts. In those days this Court chose to ignore what it personally could not witness or evaluate: the credibility and demeanor of the members of a venire. Instead this Court exalted the superiority of cold, one-dimensional records of voir dire proceedings above any deference to the position and experience of the members of the trial bench. With its decision to return to those days, the majority usurps the authority of trial courts to assess the ability of a venire persons to perform their duties.

The majority's decision creates problems for trial courts. They are now faced with the prospect of our being predisposed to second-guess their decisions on voir dire. No matter what degree of equivocation and conflict exists in the answers, demeanor, inflection, and expression of a venireperson, no matter how much these factors convince the trial court that the venireperson would be substantially impaired in his performance of his duties as a juror in accordance with his oaths and instructions, if the record reveals even one hesitant, assenting nod to a question of whether the venireperson could follow his oath, this Court will, on its own, rule that venireperson to be acceptable and hold any ruling otherwise to be in error.

For these reasons, I respectfully dissent to the majority's decision to overrule the State's motion for rehearing.

McCORMICK, P.J., and MILLER, J., join this dissent.

FN1. Tex.Penal Code Ann. Sec. 19.03 provides in part:

(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, or arson;

FN2. Appellant was convicted on November 17, 1986. All references to Tex.Code Crim.Proc.Ann.art. 37.071 will be to the statute as it appeared then, prior to its amendment on September 1, 1991.

Tex.Code Crim.Proc.Ann.art. 37.071(b) provides:

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and....

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

FN3. Former Texas Penal Code art. 12.31(b) provided:

Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

This article was amended and the italicized portion deleted in 1991 pursuant to Adams. It now states:

In a capital felony trial in which the state seeks the death penalty, prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. In a capital felony trial in which the state does not seek the death penalty, prospective jurors shall be informed that the state is not seeking the death penalty and that a sentence of life imprisonment is mandatory on conviction of the capital felony.

FN4. Unless otherwise indicated, all emphasis is supplied.

FN5. At the end of White's testimony in Adams, she stated she could not set aside her feelings concerning the death penalty and answer the statutory punishment issues honestly. Ferguson never unequivocally stated he could answer the statutory punishment issues affirmatively if the evidence supported it.

FN6. This case is to be distinguished from cases in which the veniremember never asserts she can follow the law and answer the statutory punishment issues accordingly, or when the veniremember is "unwavering in her opposition to the death penalty." Callins v. State, 780 S.W.2d 176, 196 (Tex.Cr.App.1986).

This is also not the case where a veniremember is challenged due to her "vacillation" regarding her feelings on the statutory punishment issues. Farris v. State, 819 S.W.2d 490 (Tex.Cr.App.1990). In such a case, the trial judge's rulings should be given great deference on appeal because only he "is in [the] unique position to determine whether those same feelings would prevent or substantially impair the venireperson's performance as a juror." Id. at 501.

FN1. On this score Brown testified:

"Q. Knowing that you have these deep-seated religious beliefs against the death penalty, and you have told me that you do not believe in it, if you were to serve as a juror in this case, would those feelings prevent you, or substantially impair your ability to follow your oath as a juror and render a verdict based upon the evidence and the law as given to you?

A. No.

Q. They would not?

A. (Shaking head.)

Q. In other words, you're willing to sacrifice those beliefs?

A. Yes.

Q. You would give up those beliefs, as deep-seated as they are?

A. Yes."

The State points to the following voir dire testimony that occurred shortly after the above as evidence that Brown in fact did believe she would be substantially impaired, notwithstanding the above:

"Q. All right. And if you took that oath it would be very difficult for you to live up to it, because of those feelings and values, would it not?

A. Yes, it would.

Q. Would it impair your ability to live up to that oath?

A. Impair my ability?

Q. Uh-huh.

A. What you mean?

Q. Would it make it difficult for you to live up to that oath?

A. Yes.

Q. It would therefore be very difficult for you, and you would have to sacrifice those moral beliefs, moral beliefs, if you were to fulfill your duty under your oath, wouldn't it?

A. Yes.

Q. And I take it then that your ability to perform that oath would be made most difficult by your religious and moral feelings?

A. Yes.

Q. And that your duty as a juror, and your performance as a juror, would be in direct conflict with those deep-seated religious and moral feelings?

A. Yes.

Q. Ms. Brown, I think I understand exactly how you feel. I think you have made your position very clear. I'm going to go one step further with you.

Knowing what your answers of yes would be to those questions; that is, that the death penalty would be inflicted on the Defendant, in all good conscience, all good conscience, recognizing your moral and religious beliefs, is there any way that you could vote yes and not violate your moral and religious beliefs?

A. I don't think so."

That Brown would find her task as a juror more difficult, or that it would violate her conscience to answer special issues affirmatively when the evidence called for it, knowing it would result in the death penalty, does not establish she could not do it, or even that she would be substantially impaired in doing it. In fact, she maintained throughout, whenever asked directly, that she would not be substantially impaired, and that she could and would sacrifice her conscience if called upon as a juror, however difficult that might be.

FN2. At the time of appellant's trial, in 1988, Article 37.071(b) required the jury at the punishment phase of a capital case to answer two, and sometimes three special issues. The jury's function was purely that of a factfinder, to determine whether the accused acted deliberately, was a continuing threat to society, and acted unreasonably in response to provocation, if any. The law required jurors who could serve this factfinding function without conscious distortion or bias. It required nothing more. A juror with conscientious scruples against the death penalty who could nevertheless answer the special issues honestly and in

accordance with the evidence was a juror who could follow the law. Whether the same can be said of such a juror under the current statutory regime is an open question. See n. 4, post.

FN3. The State complains that we distorted the record in our opinion on original submission when we pointed out that the trial judge "clearly stated that he was excluding Brown because of her 'moral and personal religious opposition to the death penalty.' " Maj. op. at 296-297. The State makes a legitimate point here, for the trial judge just as clearly went on to state for the record that it was because he believed that Brown's opposition "would substantially impair the performance of her duties as a juror" that he granted the State's challenge for cause. Whatever the implication of our opinion on original submission, we do not now hold that the trial court failed to use the proper standard in judging the validity of the State's challenge for cause. Rather we hold, post, that the record does not support the trial court's judgment that Venireman Brown was substantially impaired.

FN4. Under the current version of Article 37.071, supra, it is arguable that categorical opposition to the death penalty can support a trial court's conclusion that a venireman is "substantially impaired" under Wainwright v. Witt, supra, at least if that opposition would cause the venireman invariably to answer the special issue required to be submitted by subsection (e) in such a way as to prevent imposition of the death penalty. Cf. Staley v. State, 887 S.W.2d 885 (Tex.Cr.App., 1994) (rehearing denied September 21, 1994) (venireman who maintained his categorical opposition to death penalty would cause him invariably to answer jury nullification instruction in satisfaction of Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), in such a way as to prohibit imposition of death sentence was properly subject to State's challenge for cause). But under the capital punishment regime in effect at the time of appellant's trial, in 1988, a juror had only to find facts without conscious distortion or bias. He need not have been willing to "accept" the death penalty at all in order to be capable of following the law.